

# **Reinforcing the Surveillance of EU Borders**

## **The Future Development of FRONTEX and EUROSUR**

**Julien Jeandesboz**

### **Abstract**

This paper assesses the implications of the European Commission Communications on the evaluation and future development of FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) and the establishment of EUROSUR (European border surveillance system). It highlights that the evaluation of the activities conducted by the EU's external borders agency over the period 2006–07 fails to address the impact of such undertakings on fundamental rights and freedoms, solely focusing on technical issues and overall efficiency. It argues, furthermore, that the prospects for the development of FRONTEX, including through the proposal for EUROSUR, do not sufficiently address this matter either, while envisaging a significant reinforcement of the modalities of surveillance aimed at the EU's external borders. The paper discusses the proposals presented in the two Communications, showing how they raise issues from a legal, technical, budgetary and political (i.e. the political desirability of additional measures for surveillance at the EU borders) standpoint. It concludes with a set of recommendations regarding how the prospects included in the two Communications should be approached.

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# REINFORCING THE SURVEILLANCE OF EU BORDERS: THE FUTURE DEVELOPMENT OF FRONTEX & EUROSUR

JULIEN JEANDESBOZ\*

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On 13 February 2008, the European Commission tabled a ‘border package’ consisting of three Communications<sup>1</sup> dealing with the issue of the EU’s external border management. Two of these documents, namely the Communication dealing with the evaluation and future development of FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union)<sup>2</sup> and the Communication on the creation of EUROSUR (European border surveillance system),<sup>3</sup> propose significant evolutions with respect to the role of the FRONTEX agency and the orientations of the EU’s integrated border management (IBM) concept. The evaluation of FRONTEX elaborated by the Commission services is timely: since the beginning of its operational phase in 2005, the agency has considerably developed its activities in all its domains of competence, and the European Community (EC) subsidy to its budget has more than tripled over the period 2006–08. The evaluation, however, **falls short of critically assessing the consistency of FRONTEX’s activities with the fundamental values upheld by the EU**. It also neglects two corollary aspects that have been pinpointed in various surveys of the activities of the agency and in institutional proceedings, namely the concern that the agency might be too overtly oriented towards migration control and predominantly influenced by the agendas of the member states.<sup>4</sup> In this regard, it seems important to recall that **FRONTEX is a first-pillar, Community body**,

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<sup>1</sup> This piece only deals with the first two Communications encompassed in the border package. For elements on the proposed ‘entry/exit system’, which constitutes the last part of the package, see S. Carrera, F. Geyer and E. Guild, *The Commission’s New Border Package: Does it take us one step closer to a ‘cyber-fortress Europe’?*, CEPS Policy Brief No. 154, Centre for European Policy Studies, Brussels, March 2008.

<sup>2</sup> See European Commission, *Report on the evaluation and future development of the FRONTEX Agency*, COM(2008) 67 final, Brussels, 13 February 2008(a).

<sup>3</sup> See European Commission, *Communication on examining the creation of a European Border Surveillance System*, COM(2008) 68 final, Brussels, 13 February 2008(b).

<sup>4</sup> Both concerns were voiced by the European Parliament, in its February 2004 *Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders* (A5-0093/2004, February). The report notably suggests that the envisaged agency should “have a ‘more communitarian’ character” (ibid., p. 30), while warning about the foreseen competences of FRONTEX regarding return: “The European Parliament does not wish to entrust this task to an independent agency at [the] European level. There would be a clear risk that the Agency gets the character of an ‘expulsion agency’...in this specific case there would also be a danger of insufficient direct democratic control of such kind of operational activities” (ibid., p. 12). Both calls were left unanswered by the European Commission in its subsequent draft of the FRONTEX Regulation.

which should not only respect the EU fundamental values in its activities, but also work for their promotion, particularly in a field that touches upon crucial questions related to migration and freedom of movement. This policy paper first examines the contents of the two Communications, before providing a critical assessment of both the Commission's evaluation of past FRONTEX activities and the prospects opened up by plans for the development of the agency and by EUROSUR.

## 1. Background: Surveillance and the EU's 'external borders'

The management of the EU's external borders is a relatively recent concern for the European governmental arenas. Before the entry into force of the Treaty of Amsterdam and the incorporation of the Schengen agreements into the *acquis communautaire*, this matter was mainly dealt with through the third pillar, and before the entry into force of the Treaty of Maastricht, through the Schengen mechanisms. From this evolution, the domain has retained two lasting characteristics: a strong emphasis on the policing dimension of border management and a persisting predominance of national actors. Indeed, the logic that presided over the conclusion of the Schengen accord and application convention was that the lifting of internal controls within 'Schengenland' should be accompanied by the reinforcement of controls at the external borders of the ensemble.<sup>5</sup>

Discussions about an EU border management model are thus relatively recent,<sup>6</sup> and despite the attempts at consolidation of late, elements of such a model remain scattered across a range of documents with varying statuses.<sup>7</sup> The first elements were laid out in the Council of the European Union's *Plan for the management of the external borders* adopted on 14 June 2002. Other components came later on to refine the model, including the Schengen Border Code<sup>8</sup> and Practical Handbook for Border Guards.<sup>9</sup> It is, however, only in the last months of 2006, under the auspices of the Finnish presidency, that the Justice and Home Affairs Council came to an authoritative and formalised definition of the EU's IBM model, comprising the following:<sup>10</sup>

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<sup>5</sup> For further elements, see among others M. Anderson et al., *Policing the European Union: Theory, Law, and Practice*, Oxford: Clarendon Press, 1995; see also D. Bigo, *Polices en réseaux: l'expérience européenne*, Paris: Presses de Sciences Po, 1996. This logic, however, has not precluded the persistence of internal checks, albeit in a rather 'scattered' fashion. See A. Faure Atger, *The Abolition of Internal Border Checks in an Enlarged Schengen Area: Freedom of movement or a scattered web of security checks?*, CEPS CHALLENGE Research Paper No. 8, Centre for European Policy Studies, Brussels, March 2008.

<sup>6</sup> On this matter as well as on the creation of FRONTEX, see also H. Jorry, *Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?*, CEPS CHALLENGE Research Paper No. 6, Centre for European Policy Studies, Brussels, March 2007.

<sup>7</sup> See P. Hobbing, "Integrated Border Management at the EU Level", in T. Balzacq and S. Carrera (eds), *Security Versus Freedom? A Challenge for Europe's Future*, London: Ashgate, 2006, pp. 155–82.

<sup>8</sup> See European Parliament and Council of the European Union, Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) of 15 March 2006, (EC) No. 562/2006, OJ L 105/1, 13.04.2006.

<sup>9</sup> See the Commission Recommendation on establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C(2006), 5186 final, Brussels, 6 November 2006.

<sup>10</sup> See Council of the European Union, "Justice and Home Affairs, 2768<sup>th</sup> Council Meeting", Press Release, 15801/06 (Press 341), Brussels, 2006(b), p. 27.

- border control, including border checks and the surveillance of borders, risk analysis and the gathering of intelligence;
- detection and investigation of cross-border crime;
- a four-tier access control model, including measures in non-EU countries, cooperation with neighbouring countries, border controls and controls within the area of free movement;
- interagency and international cooperation for border management; and
- coordination and coherence among the member states and with EU bodies.

In this respect, **the emphasis on control and surveillance is an enduring trend in the formulation of the EU's IBM model.** No mention is made, in the EU's IBM of the fundamental rights and freedoms including the right to departure, the right to international protection and so forth. As stated unambiguously by the Council in earlier deliberations about the EU's IBM concept, "[b]order management is a security function in which all Member States have a common interest that stems from the Schengen arrangement. First and foremost, border management is an area of policing, where security interests have to be met while fully recognizing the commitments in the field of international protection and human rights."<sup>11</sup> In other words, freedom is balanced against security in EU border management, but security comes first. In addition, the predominance of national actors remains the rule: accordingly, the EU's IBM concept speaks only about 'coherence' and 'coordination' between the member states and EU agencies and services.

The creation of FRONTEX has not changed much in this perspective. From the onset, national governmental actors have been keen on reasserting their predominance over the agency and its possible evolutions. While preparatory studies had suggested the possibility of creating an EU "border police",<sup>12</sup> subsequent developments resulted in the marginalisation of this proposal. An example of this can be found in the formal designation of FRONTEX: while the initial Commission proposal talked about a "European agency for the management of operational cooperation at the external borders",<sup>13</sup> Regulation (EC) No. 2007/2004, adopted after discussions among the member states, speaks of a "European agency for the management of operational cooperation at the external borders *of the Member States of the European Union*" (emphasis added). This predominance holds true for most of the agency's domains of competence, including the provision of technical assistance and equipment or assistance in so-called 'return' operations. The composition of the agency's staff is also very telling in this respect, showing an important dependence upon 'seconded national experts' (SNEs) from member states' border guard agencies and services: in January 2006, the FRONTEX staff numbered 28, including 27 SNEs; in December, the total staff of the agency amounted to 142, with 67 SNEs.

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<sup>11</sup> See Council of the European Union, *Integrated Border Management: Strategy Deliberations*, 13926/06, FRONT 207/COMIX 826, Brussels, 2006(a), p. 3.

<sup>12</sup> Two initiatives are worth mentioning in this respect. The first one is a "Feasibility Study on the Creation of a European Border Police" elaborated jointly under Italian leadership by experts from Belgium, France, Germany and Spain in 2002 ("Feasibility study for the setting-up of a 'European Border Police'", JHA Ministerial Conference in Rome, 30 May 2002). The second one is a "Workshop on Police and Border Security" animated by the Austrian, Belgian and Finnish authorities the same year (Interview, DG H, General Secretariat of the European Union, Brussels, January 2007).

<sup>13</sup> See European Commission, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders, COM(2003) 687 final/2, Brussels, 2003.

Furthermore, FRONTEX now seems to stand at the heart of the drive for surveillance of the borders unfolding across in the EU governmental arenas.<sup>14</sup> This trend is in fact composed of several elements. The first one is a reliance upon so-called ‘intelligence-led policing’, including in particular the use of risk analyses and profiles in the conduct of social control activities.<sup>15</sup> In this area, one of the main activities of FRONTEX since its inception has been the provision of risk analyses and feasibility studies on border surveillance, especially through the implementation of the Common Integrated Risk Analysis Model (CIRAM), of which Brigadier General Ilkka Laitinen, current head of FRONTEX, is one of the drafters.<sup>16</sup> Laitinen himself has been clear as to the importance of such activities for his agency, stating in a public meeting at the European Parliament that “[a]ll FRONTEX activities are based on risk analyses, the ‘engine’ of FRONTEX activities”.<sup>17</sup> The second component of the EU drive in the surveillance of EU borders over the past few years has been the development of a series of technological devices, notably databases, for monitoring individuals on the move.<sup>18</sup> The third component – which is already available to national border guard agencies and services and if the EUROSUR proposal is followed, might take the form of an EU-wide mechanism – is the deployment of surveillance systems at or beyond the geographical ‘external’ borders.

These considerations are important in light of the proposals for the future development of EU border management activities issued by the European Commission in its border package. As the following pages show, these proposals are mainly concerned with intensifying the surveillance of EU borders. In doing so, they seem to lead to an upsetting of the current repartition of competences in relation to border management in the EU, between the member states and the Community. In the process, they also further marginalise considerations of the fundamental rights and freedoms of individuals, which should lie at the heart of EU preoccupations.

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<sup>14</sup> For additional details, see J. Jeandesboz, “Information sharing and borders: The role and limits of Frontex”, Paper presented at the CHALLENGE seminar on “Intelligence, borders and surveillance”, CERI, Paris, 21 April 2008 (unpublished manuscript).

<sup>15</sup> For a more in-depth reflection on the changes induced by the notion of intelligence-led policing in the work of police forces, its components and origins, see among others J. Sheptycki, *In Search of Transnational Policing: Towards a Sociology of Global Policing*, Aldershot: Ashgate, 2002.

<sup>16</sup> On this aspect and for comments on the CIRAM, see S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document No. 261, Centre for European Policy Studies, Brussels, March 2007, as well as Jorj (2007), *op. cit.*

<sup>17</sup> See I. Laitinen, “Introductory talk to the Joint Parliamentary Meeting initiated by the European Parliament and the Parliament of Finland: ‘From Tampere to the Hague’”, Brussels, 2–3 October 2006.

<sup>18</sup> For an assessment, see F. Geyer, *Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice*, CEPS CHALLENGE Research Paper No. 9, Centre for European Policy Studies, Brussels, May 2008. Additional elements can also be found in E. Brouwer, “Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection”, in T. Balzacq and S. Carrera (eds), *Security Versus Freedom? A Challenge for Europe’s Future*, London: Ashgate, 2006, pp. 137–54.

## 2. The Communications on the future of FRONTEX and the creation of EUROSUR

### 2.1 *The report on the evaluation and future development of the FRONTEX agency*

The Commission's evaluation of FRONTEX can be divided into two parts: the assessment of the agency's activities in the period 2005–07 on the one hand, and the prospects for the development of its role and competences on the other. The former, as later discussed, remains rather uncritical of the past activities of FRONTEX, while the latter is highly ambitious in the possible expansion of the agency's role and competences. The main criticism expressed in the Communication focuses on questions of effectiveness and coherence, but the document does not seek to address the impact of FRONTEX's activities with respect to the fundamental freedoms and rights of individuals. While deemed a political evaluation in its opening paragraphs, the document then solely focuses on the technical issues that have arisen in the course of FRONTEX's activities, a perspective that re-emerges in the options for the development of the agency.

#### 2.1.1 *The evaluation of FRONTEX's activities over the period 2005–07*

The evaluation of FRONTEX's activities over the period 2005–07 is divided according to the six domains of competence devolved to the agency in Art. 2(1) of Council Regulation (EC) No. 2007/2004:<sup>19</sup>

- coordination of operational cooperation among member states' border guard services – Art. 2.1(a);
- assistance to member states' border guard services in the area of training – Art. 2.1(b);
- the carrying-out of risk analyses – Art.2.1(c);
- the follow-up of developments in research relevant to border control and surveillance – Art. 2.1(d);
- technical and operational assistance to member states' border guard services – Art. 2.1(e); and
- support for member states' authorities in organising joint return operations – Art. 2.1(f).

In all these areas, the agency received a favourable appreciation from the Commission. The coordination of joint operations has received marked praise, notably concerning the important increase in the number of such operations over the period 2006–07 (with 8 in 2006 and 24 in 2007).

In relation to the **coordination of operational cooperation** among member states, especially for the realisation of joint operations, the Commission's evaluation delivers an overall *satisfecit* for the agency's activities,<sup>20</sup> with a strong insistence on quantifiable results, while remaining rather evasive in its qualitative assessment:

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<sup>19</sup> See Council of the European Union, Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union of 26 October 2004, (EC) No. 2007/2004, OJ L 349/1, 25.11.2004.

<sup>20</sup> A full list of FRONTEX's joint operations is featured in the statistical addendum to the evaluation report. See European Commission, *Report on the evaluation and future development of the FRONTEX Agency – Statistical data*, Commission Staff Working Document, SEC(2008) 150, Brussels, 13 February 2008(d).

Results of joint operations cannot be summarised solely in quantifiable terms. There are other benefits such as exchanging best practices and information between Member States and stimulating day-to-day cooperation between national border guard authorities. Nevertheless, the quantifiable results so far must be considered impressive: more than 53,000 persons, for 2006 and 2007 together, have been apprehended or denied entry at the border during these operations. More than 2,900 false or falsified travel documents have been detected and 58 facilitators of illegal migration arrested.<sup>21</sup>

In this respect, the evaluation report also welcomes the launch of the European Patrols Network (EPN)<sup>22</sup> and the establishment by the agency of the Central Record of Available Technical Equipment (CRATE) database.<sup>23</sup>

With regard to **training**, the report notes that a “total of 97 trainings, meetings and workshops including training of border guards and ‘training of trainers’ have been organised with a total of 1,341 participants”.<sup>24</sup> It also highlights that the common core curriculum, established under the former Ad Hoc Centre for Training (ACT)<sup>25</sup> is currently under review.

In relation to **risk analyses**, the report delivers a favourable appraisal of the agency’s record in delivering general and tailored risk analyses, as well as two feasibility studies, namely the MEDSEA<sup>26</sup> and BORTEC<sup>27</sup> studies:

- MEDSEA. This study was delivered to the Council Secretariat on 24 July 2006. MEDSEA focuses on the possibilities for enhancing operational cooperation in the patrolling of the EU’s southern maritime borders and the Mediterranean. It envisages in particular the setting-up of Mediterranean Coastal Patrol Networks and the establishment of information-sharing mechanisms between the border agencies and services of the member states, along with FRONTEX, including access to civilian maritime monitoring instruments.
- BORTEC. This study is dedicated to the identification of needs and feasibility of deploying a European border surveillance system focusing on the EU southern maritime borders, including the Mediterranean. It is the follow-up to the conclusions set out in the MEDSEA study. It was realised by a group of national experts from the member states directly concerned by the issue, together with support from a variety of EU agencies

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<sup>21</sup> See European Commission (2008a), op. cit., p. 3.

<sup>22</sup> The EPN is the result of a request issued to FRONTEX by the European Council, in the Presidency Conclusions of its December 2006 meeting. The EPN started its operations in May 2007 and currently consists of a permanent joint operation in selected areas of the Atlantic Ocean and the Mediterranean, coordinated by the agency and run by the border guard services of nine member states (Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia and Spain).

<sup>23</sup> The FRONTEX CRATE database was created at the request of the Council. It compiles lists of equipment that can be made available upon request to member state border-guard agencies and services.

<sup>24</sup> See European Commission (2008a), op. cit., p. 4.

<sup>25</sup> The ACT was one of several ad hoc centres established in the period 2002–05 under the SCIFA+ committee, in the follow-up of the 2002 Council *Plan for the management of the external borders*, 10019, Brussels, 14 June. On the ACT, see Council of the European Union (2003), *Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations* (10058/1/03) Brussels, 11 June.

<sup>26</sup> As with BORTEC, the MEDSEA feasibility study is only available in a partially declassified version. See Council of the European Union (2006c), *Frontex feasibility study on Mediterranean Coastal Patrol Networks*, 12049/06, Brussels, 20 November.

<sup>27</sup> A partially declassified version of BORTEC is available in Annex 7 of the impact assessment document attached to the Eurosur communication.



and services (including the Joint Research Centre of DG Research, the European Defence Agency, the European Space Agency and the European Joint Satellite Centre), under the leadership of FRONTEX. The study was completed in December 2006, and most of the elements laid out in BORTEC, including the technologies to be used in border surveillance activities and the institutional layout required to incorporate these activities throughout the EU, have been encompassed in the EUROSUR proposal detailed below.

Besides the discussion of the MEDSEA and BORTEC studies, the Commission report also highlights the collaboration between FRONTEX and Europol, with the former having contributed to the latter's yearly *Organised Crime Threat Assessment* report, and both having jointly elaborated a tailored risk assessment on migration routes through the Balkans. It further stresses the importance in this domain of FRONTEX's competence in terms of having the agency connected to the ICONet information exchange system between the national agencies and services in charge of the management of migrations.<sup>28</sup> Finally, it welcomes the involvement of FRONTEX in the discussions of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI).<sup>29</sup>

Concerning **research in the field of border management**, the report notes that the agency "has so far implemented 6 projects and 7 workshops/seminars on research and development".<sup>30</sup> FRONTEX has also been active in implementing the BIOPASS research project on automated, biometric border-crossing systems.<sup>31</sup>

On the **provision of technical and operational assistance to member states**, the evaluation singles out the setting-up of rapid border intervention teams (RABITs) as the main evolution for the agency. RABITs were established by Regulation (EC) No. 863/2007 adopted by the European Parliament and the Council in July 2007. They basically constitute a pool of officials from member states' border guard agencies and services that can be deployed upon request by a member state in situations of "urgent and exceptional pressure".<sup>32</sup> RABIT officials operate under the authority of the requesting state. According to the FRONTEX evaluation report, there are currently 500 to 600 officials available for RABIT deployment, but the capacity has not been used so far.<sup>33</sup>

Finally, with reference to **support for return operations**, the evaluation report indicates that the agency "has provided assistance for the organisation of nine joint return operations. A further six projects have been taken forward on issues such as best practices for the acquisition

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<sup>28</sup> The Information and Coordination Network for Member States' Migration Management Services was established by Council Decision 2005/267/EC of 16 March 2005 (OJ L 83/48, 1.4.2005). It has been operational since 2006, under the supervision of the European Commission.

<sup>29</sup> The CIREFI was created in 1992 as a discussion group within the Council for exchanging information about migratory movements between member states.

<sup>30</sup> See European Commission (2008a), op. cit., p. 6.

<sup>31</sup> See FRONTEX, *BIOPASS: Study on Automated Biometric Border Crossing Systems for Registered Passengers at Four European Airports*, Warsaw, August, 2007. As part of its research activities, it is foreseen in the Communication that FRONTEX will be significantly involved in the 7<sup>th</sup> Framework Programme thematic research area on security, as well as in the proceedings of the European Security Research and Innovation Forum.

<sup>32</sup> See European Parliament and Council of the European Union, Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers of 11 July 2007, (EC) No. 863/2007, OJ L 199/30, 31.7.2007, Art. 1.

<sup>33</sup> See European Commission (2008a), op. cit., p. 7.

of travel documents and in order to regularly identify common needs for joint return operations”.<sup>34</sup> This area has received the least favourable appreciation in the Commission’s evaluation, which points out: “This is a key task of FRONTEX, but results so far have shown that the frequency and intensity of that support is lagging behind the progress made with regard to operation coordination.”<sup>35</sup>

### 2.1.2 Prospects for future developments

The prospects for the future development of FRONTEX consist of short/medium- and long-term proposals and recommendations.

The evaluation report delivers **10 short/medium-term recommendations**,<sup>36</sup> distributed among the following domains:

- *Coordination of operational cooperation.* The priorities include the possibility of improving the use of the CRATE database, including by reviewing how FRONTEX could acquire and lease equipment. It is also envisaged that some joint operations could be merged within the EPN (thus becoming semi-permanent ventures). Furthermore, the Commission underlines that the possibility given to the agency of opening specialised branches in specific countries<sup>37</sup> should be considered, with priority given to the southern maritime borders.
- *Training.* The report suggests that specialised training should be delivered through the agency “on relevant provisions of European and international rules on asylum, the law of the sea and fundamental rights, in order to contribute to the full respect of these norms and to a consistent approach to situations involving search and rescue coordination”.<sup>38</sup>
- *Risk analysis.* The report stresses that risk analysis activities, especially joint analyses with other EU agencies, international organisations or border guard authorities of non-EU countries should be encouraged. More importantly, it proposes that FRONTEX be granted the management of ICONet and take over the activities of CIREFI.
- *Research.* The report indicates that FRONTEX, through its research unit, should make sure that the concerns and operational requirements of border guard services are taken into consideration in the development of new technologies.
- *Technical and operational assistance.* The Commission insists that FRONTEX should be allowed to acquire its own equipment to be used in the case of RABIT deployments.
- *Return.* First, the report highlights that putting FRONTEX in charge of the management of ICONet will enhance its profile in return-related activities. Second, it suggests that the CRATE database could be expanded to include equipment, particularly aircraft, available for joint return operations.

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> See the impact assessment attached to the evaluation report (pp. 24–36) in European Commission, *Report on the evaluation and future development of the FRONTEX Agency – Impact Assessment*, SEC(2008) 149, Brussels, 13 February 2008(c).

<sup>37</sup> See Art.3(2) of Council Regulation (EC) No. 2007/2004 (op. cit.). So far, no such specialised branches have been opened.

<sup>38</sup> See European Commission (2008a), op. cit., p. 5.

The Communication on the future of FRONTEX further issues five **long-term recommendations**,<sup>39</sup> some of which might require changes in the existing FRONTEX Regulation. These recommendations include the possibility for FRONTEX to contribute to the Schengen evaluation mechanism, to engage in pilot projects with non-EU countries (notably those identified as problematic) and to develop activities concerning ‘horizontal integration’ between border guard and customs agencies and services. Two recommendations stand out, however, in that they seem to call for a significant evolution in the current functioning of the agency. On operational coordination, while committed to the idea that “[o]perational coordination has already proven itself the key instrument of the European Union in ensuring operational solidarity between Member States”, the report nonetheless points out that “the Commission intends to return to the question of a fully fledged European Border Guard system when experiences have been gathered” on the functioning of RABITs.<sup>40</sup> Yet in the meantime, the fifth and most ambitious prospect for the future development of FRONTEX lies in the suggestion to establish EUROSUR.

## 2.2 The Communication on the creation of EUROSUR

The EUROSUR Communication was prepared through the BORTEC feasibility study tabled in December 2006 by FRONTEX and an earlier study conducted at the request of the Commission’s Directorate-General (DG) for Justice, Liberty and Security by the external consultancy Civipol Conseil.<sup>41</sup>

### 2.2.1 Rationale of the EUROSUR proposal

The general concept of an EU border surveillance system is to integrate further the existing member state border-surveillance systems, with the long-term objective of developing common tools and instruments for border surveillance at the EU level. This initiative would ultimately lead to the establishment of a “common monitoring and information sharing environment”,<sup>42</sup> with a specific focus on the southern maritime borders of EU member states. Indeed, while the EUROSUR Communication envisages a system that would cover the EU’s land and sea borders, the priority is given to the southern maritime reaches of the Union. EUROSUR, from this standpoint, should contribute to the enhancement of the surveillance and information-sharing capacities of border guard agencies and services. As highlighted in the Communication, “[a] European Border Surveillance System...should support the Member States in reaching full

situational awareness on the situation at their external borders and increase the reaction capability of their law enforcement authorities”.<sup>43</sup> This is deemed necessary to meet three main objectives:

- “[r]eduction of the number of illegal immigrants who manage to enter the EU undetected”;
- “[i]ncrease internal security of the EU as a whole by contributing to the prevention of cross-border crime”; and
- “[e]nhance the search and rescue capacity”.<sup>44</sup>

<sup>39</sup> See European Commission (2008c), op. cit., pp. 36–42.

<sup>40</sup> Ibid., p. 10.

<sup>41</sup> It should be noted that Civipol Conseil is also a regular subcontractor of the French Ministry of Interior.

<sup>42</sup> See European Commission, *Examining the creation of a European Border Surveillance System (EUROSUR) – Impact Assessment*, Commission Staff Working Document, SEC(2008) 152, Brussels, 13 February 2008(e), p. 19.

<sup>43</sup> See European Commission (2008b), op. cit., p. 4.

### 2.2.2 *The Commission's roadmap for setting up EUROSUR*

The EUROSUR Communication and its accompanying impact assessment map out **four ‘policy options’**, for a period running up to 2013. These constitute both alternatives from which to choose and a roadmap to be followed should the EUROSUR initiative be developed to its full potential.

**Policy Option 1** is the status quo option. It specifies that the development of EU border management activities follows the plans established in the 2004 Hague Programme and the May 2005 Communication from the Commission on The Hague Programme: Ten priorities for the next five years.<sup>45</sup>

**Policy Option 2** involves “[i]nterlinking and streamlining existing surveillance systems and mechanisms at Member States’ level”.<sup>46</sup> As a first step, national coordination centres (NCCs) would be created in the eight member states concerned with the EU’s southern maritime border. The NCCs would act as information and intelligence-gathering hubs for border surveillance activities at the national level. The second step would involve interlinking the NCCs in a computerised network for the continuous, real-time sharing of information and intelligence, including FRONTEX, which in this situation could act as a border-management situation centre. In a third stage, activities would be focused on non-EU countries, chiefly those of the EU neighbourhood, for capacity-building purposes (equipment and training).

**Policy Option 3** includes Policy Option 2 and takes it further by envisaging the “[d]evelopment and implementation of common tools and applications for border surveillance at EU level”.<sup>47</sup> This would allow for covering ‘blind spots’ in existing national border-surveillance systems, through the development of new technologies (particularly UAV<sup>48</sup> and earth observation technologies), new applications for information sharing (going beyond the question of interoperability among national information systems) and the establishment by FRONTEX, through its connection to such new applications, of a “common pre-frontier intelligence picture”.<sup>49</sup>

**Policy Option 4** includes all of the previous ones within the objective of creating a “common monitoring and information sharing environment for the EU maritime domain” based on an “integrated network of maritime monitoring and surveillance systems” (a so-called ‘system of systems’).<sup>50</sup> While the previous policy options can involve all types of borders, the advanced elements proposed in Policy Option 4 will concentrate more specifically on EU maritime borders: first, the Mediterranean, the Canary Islands region and the Black Sea, and later on the entire Atlantic Ocean area, the North Sea and the Baltic Sea. The core of the option would be to integrate within a common informational structure the various systems of maritime monitoring and surveillance in operation, European and international alike, whether they are used for

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<sup>44</sup> Ibid.

<sup>45</sup> See European Commission, Communication on The Hague Programme: Ten priorities for the next five years, the Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, Brussels, 10 May 2005.

<sup>46</sup> See European Commission (2008e), op. cit., p. 25.

<sup>47</sup> Ibid., p. 29.

<sup>48</sup> UAV refers to unmanned aerial vehicles.

<sup>49</sup> See European Commission (2008e), op. cit., p. 33.

<sup>50</sup> Ibid., p. 34.

maritime safety, environmental protection, fishing activities or border monitoring purposes.<sup>51</sup> The objective would be to provide a structure for collecting, fusing, analysing and disseminating information about all the movements occurring in the territorial waters of EU member states and beyond, operating 24 hours a day and in real time. FRONTEX, through an envisaged 'FRONTEX information system', would play the role of a hub for analysing and disseminating information and intelligence.

### 3. Analysis

The present section puts the FRONTEX evaluation report and future plans for the development of the agency in perspective, with regard to legal (2.1), budgetary (2.2) and technical feasibility issues (2.3), and those associated with fundamental freedoms and rights (2.4).

#### 3.1 *Legal issues: The expansion of FRONTEX's competences*

The two Communications on the future of FRONTEX and the setting-up of EUROSUR open the way for significant developments in the role and competences of the agency. More specifically, should the EUROSUR roadmap be fully endorsed, this will lead to the establishment of FRONTEX as a node for sharing information and intelligence gathered through the surveillance apparatus deployed at the EU's external borders. The implications of this expansion should be properly stressed, even more so **since FRONTEX is a first-pillar agency** (falling under Title IV of the Treaty establishing the European Community or TEC) and **not a third-pillar body** (under Title VI of the TEC). Since the prospects for the entry into force of the Lisbon Treaty, which puts an end to the pillar structure, are uncertain at this time, such a consideration remains crucial for the future development of FRONTEX.

**Will the measures proposed by the Commission entail a modification of the legal basis of FRONTEX?** The Commission's proposals for the future development of the agency envisage an incremental, step-by-step approach. This incremental approach raises the issue of respect for the principle of legality and rule of law. It seems to have become a habit of EU agencies to develop activities in many fields without the proper legal basis, with legal aspects coming in *ex post* to validate these activities de facto (e.g. Europol). From this perspective, the short/medium-term recommendations issued by the Commission's evaluation report of the agency will not require the modification of Regulation (EC) No. 2007/2004, except for the possibility to use the CRATE database in the context of return operations. The first three long-term measures mentioned above will widen the range of FRONTEX's activities and competences, thus requiring a modification of the FRONTEX Regulation, albeit in a reasonable fashion. The last two recommendations, namely the possibility for the agency to obtain direct operational capacities and the development of EUROSUR, will change the scope of FRONTEX's activities and **require a significant revision of Regulation (EC) No. 2007/2004.**

**Will the measures change the repartition of competences between the Community and the member states?** The long-term recommendations issued by the Commission will result in a significant modification of the current repartition of competences between the Community and the member states in the area of external borders, where the latter currently enjoy an 'exclusive' competence. The participation of FRONTEX in the Schengen evaluation mechanism will put the agency in a position to scrutinise member state activities in this area. Giving FRONTEX the possibility of running pilot projects with non-EU countries in the area of border management will give the agency an added degree of autonomy in the EU's external relations and within the

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<sup>51</sup> This is also proposed in the European Commission's Communication on an Integrated Maritime Policy for the European Union, COM(2007) 575 final, Brussels, 10 October 2007.

common foreign and security policy. Opening the potential for FRONTEX to run ‘horizontal integration’ activities creates opportunities for the agency to intervene in the internal organisation of state agencies and services of EU countries. Granting the agency operational capacities will pave the way for the creation of an EU ‘border police’ – an orientation that was initially envisaged before the setup of FRONTEX, but was explicitly turned down by the member states in the negotiations prior to the adoption of Regulation (EC) No. 2007/2004.

The creation of EUROSUR, finally, could also result in important modifications:

- **Policy Option 2.** The creation of NCCs, insofar as such centres do not yet exist, will amount to an EU-sponsored modification of the internal security apparatus of member states. The interlinking of NCCs into a computerised network for information exchange in this respect will raise the question of the principle of availability, which can be construed as an encroachment on member states’ sovereignty.
- **Policy Option 3.** The envisaged development of common tools and applications in the field of border surveillance amounts to the establishment of a common research and procurement policy in border security, and presupposes the establishment of a common market for security (and arguably defence) goods. While this orientation has been in preparation for some time, notably through the Commission’s Preparatory Action for Security Research initiative,<sup>52</sup> it has been consistently resisted by member states over the past two decades, on the basis that defence and security procurements are essential parts of their sovereign attributes.
- **Policy Option 4.** The integration of existing systems for the monitoring and surveillance of member states’ maritime domains is bound to create tensions, as it will result in the establishment of a common informational environment for borders that are still, under the current format, considered the exclusive competence of member states. This juxtaposition could be construed by the latter as an encroachment upon this exclusive competence.

### **3.2 Budgetary issues: Current and foreseeable costs of the EU’s border surveillance activities**

As indicated in the introductory remarks, the EC subsidy allocated to FRONTEX has been multiplied by three and a half times over the period 2006–08, from €18,940,000 in 2006 to a forecasted €68,000,000 in 2008. The EC is the main contributor to the budget of the agency. The figures for 2008 are likely to be higher than anticipated, as was the case in 2006 and 2007, which saw the EC subsidy to the agency increase through subsequent amendments by roughly €7 million for each year. Of this funding, 68.17% was allocated to operational matters in 2006, with the figure set at 65.54% for 2008. Within the operational budget, sea border operations account for the highest proportion, reaching 70.63% in 2006 and 40.17% in 2007 (which has seen an increase in the amounts spent on land operations, from 6.96% to 17.71%). The overall increase for operational expenditures, in this respect, amounts to 140% (with the 2008 budget included).<sup>53</sup> These figures are substantially higher than the initial funding projected for the agency: the impact assessment document notes in this respect that “the 2008 budget will be approximately 70 million euro, which is as high as the 2013 budget initially foreseen for the

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<sup>52</sup> See D. Bigo and J. Jeandesboz, *Review of security measures in the 6<sup>th</sup> Research Framework Programme and the Preparatory Action for Security Research*, Standard Briefing Note for the European Parliament, FWC LIBE, Lot 7, C1/SC6, June 2008.

<sup>53</sup> See House of Lords European Union Committee, *FRONTEX: The EU external borders agency, report with evidence*, 9<sup>th</sup> Report of Session 2007–08, London: Stationery Office Ltd, March 2008.

Agency”.<sup>54</sup> FRONTEX is thus turning into a costlier-than-expected venture for the EU budget, and will likely be even more so given the evolutions proposed by the European Commission.

Are these expenses justified in terms of results? The evaluation report presents as an achievement the fact that, through FRONTEX operations, roughly 53,000 persons were arrested or denied entry over the period 2006–07. Yet, the report falls short of providing a qualitative assessment of this result. According to OECD data, net migration for the EU-25 (plus Norway and Switzerland) in 2005 was more than 2.5 million. In addition, based on the Commission’s own data, 800,000 persons were refused entry in the EU-25 in the same year.<sup>55</sup> In the meantime, the agency spent €24,128,619 in operational expenses (all borders included), which makes for a ratio of €455 per person. This breakdown, of course, does not include the operational costs taken up by the member states, nor does it take into account the so-called ‘return operations’ coordinated by FRONTEX, which concerned 287 persons in 2006–07 and for which budget details are not included in the statistical annex. In addition, it does not take into account the personal injury costs linked to individuals who might have died during FRONTEX operations. In a recent series of decisions involving acts of violence perpetrated by the Turkish authorities upon migrants,<sup>56</sup> the European Court of Human Rights (ECtHR) has held Turkey liable for paying the plaintiffs for pecuniary damage, for amounts reaching respectively €74,500, €96,000 and €183,000 (the latter for a case involving several applicants). Such costs, which might arise in the future, also have to be taken into consideration in evaluating the results of FRONTEX’s activities. As a general conclusion, it is worth indicating that given the amounts spent by the agency, the results are unimpressive. This point has been stressed in a recent report of the UK House of Lords European Union Committee concerning the increase in the resources allocated to FRONTEX for 2008: “We believe the increased resources may usefully lead to a modest increase in the number of operations in 2008, but should be concentrated on further increasing the quality of those operations.”<sup>57</sup>

What are the foreseeable costs of the measures proposed by the European Commission? So far, the Commission has not proposed a detailed cost analysis for the measures envisaged under the FRONTEX evaluation and EUROSUR Communications.

- **Short/medium-term measures for the development of FRONTEX.** Most of the costs incurred by these measures will have to be met through the FRONTEX budget. In particular, measures related to the expansion of the agency’s operational capacities, in view of past trends, are likely to have a strong impact. These measures include the merger of joint operations with the EPN, which will eventually cut down operational deployment costs but will nonetheless have a significant initial setup cost as well as cumulated costs for the deployment and maintenance of equipment co-financed by FRONTEX. The possibility for the agency to acquire its own equipment will also put additional strain on the FRONTEX budget, as well as an expanded role in return operations as projected, which might include the deployment of equipment and personnel. The other costs will most likely represent a smaller increase. Finally, the involvement of FRONTEX in research on border management technologies will not have a direct effect on the agency’s

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<sup>54</sup> See European Commission (2008c), op. cit., p. 7.

<sup>55</sup> See European Commission, *Second annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external border controls and the return of illegal residents*, Commission Staff Working Document, SEC(2006) 1010, Brussels, 19 July 2006.

<sup>56</sup> See *Süheyla Aydin v Turkey* (Application No. 25660/94, ECtHR judgement of 24 May 2005); see also *Yasin-Ates v Turkey* (Application No. 30949/96, ECtHR judgement of 31 May 2005); and also *Erdogan and others v Turkey* (Application No. 19807/92, ECtHR judgement of 25 April 2006).

<sup>57</sup> See House of Lords European Union Committee (2008), op. cit., p. 29.

budget, but is likely to have an impact on other elements of the EU's budget, especially the Community's 7<sup>th</sup> Research Framework Programme (FP7)<sup>58</sup> and other initiatives that the Commission might want to set up.<sup>59</sup>

- **Long-term measures.** The costs of the long-term measures (aside from EUROSUR, which is dealt with below) remain difficult to assess. Participation in the Schengen evaluation mechanisms and activities of horizontal integration between member states' border-guard and customs agencies and services will probably not add significant expenses, since they do not involve the deployment of equipment and rely on existing structures. The budgetary impact of the possibility for FRONTEX to set up joint projects with non-EU countries will depend on whether FRONTEX will fund these projects from its own budget or whether it will implement projects funded under the EU's external relations instruments. Costs will also be linked to the scope of such projects.<sup>60</sup> Finally, regarding the development of direct operational capacities within FRONTEX, there are no previous experiences that can enable even a rough assessment of the costs. FRONTEX would become the first EU security agency with such capacities. Such developments would involve a major increase in both administrative and operational costs.
- **EUROSUR.** The main costs pertaining to the development of EUROSUR will not be borne by the FRONTEX budget. The development of national coordination centres and national border surveillance systems, and the interlinking of these centres and systems with FRONTEX are covered under the 2004–06 Schengen facility (€61.4 million) and the 2007–09 cash flow and Schengen facility (€799.3 million). Under the 2007–13 external borders fund (with a total commitment of €1,820 million), these issues have been flagged as specific priorities, increasing the rate of Community contributions from 50% to 75%. Support for the border management infrastructure of non-EU countries, while not yet evaluated, will come under existing Community external relations instruments (most likely the European Neighbourhood and Partnership Instrument). Research and development for common application tools will be taken up by the FP7. The establishment of mechanisms for the 'common pre-frontier intelligence mechanism' will also fall under the external borders fund. For the last steps in the development of EUROSUR, namely the establishment of an information-sharing environment about select areas of the EU's external maritime borders and its later extension, figures and funding schemes are not available.<sup>61</sup>

The main point that can be made from of this survey is that the proposed measures for the future development of FRONTEX and EUROSUR will represent **a major financial effort for the Community, not only through the budget of the agency, but also through a variety of other instruments, including the external borders fund and external relations instruments.**

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<sup>58</sup> Under FP7, Theme 9 (Space) has been allocated €1,430 million and Theme 10 (Security) €1,400 million. Border security is one of the four priority areas in these thematic domains.

<sup>59</sup> For example, the Preparatory Action on Security Research initiative, which was set up in 2004 by the Commission and included projects on border surveillance technologies, was allocated a budget of €44.5 million of Community contributions. See D. Bigo and J. Jeandesboz (2008), *op. cit.*

<sup>60</sup> As an illustration, the EU has been running such a project in its neighbourhood since November 2005, the European Union Border Assistance Mission to Moldova and Ukraine (EUBAM). The EUBAM was initially allocated €4 million under the Commission's Rapid Reaction Mechanism for the first 6 months, completed by another €6 million for the following 18 months (amounting to €20 million for the first 24 months of the mission) under the TACIS instrument.

<sup>61</sup> See the EUROSUR impact assessment document – European Commission (2008e), *op. cit.*, p. 54.



### **3.3 Technical issues: The feasibility of EUROSUR**

The question of the technical feasibility of some of the projected steps remains unanswered, particularly concerning the development of EUROSUR. The related Communication envisages, as a first step beyond the status quo option, the interlinking and streamlining of existing national border-surveillance systems. These systems, however, have taken years to develop, and in most cases they are not even interconnected at the national level, for reasons tied to either technical issues of hardware and software compatibility, legal matters such as data protection laws or simply bureaucratic feuds among the national border-guard agencies and services. The question of feasibility, in this respect, will become even more pressing should the fourth policy option previewed in the EUROSUR Communication be selected as the desirable outcome. Integrating civil protection, the monitoring of maritime traffic and border surveillance systems is something that has not even been implemented at the national level. To envisage such a development by 2013, as suggested in the EUROSUR Communication, seems unrealistic at best, as it presupposes the political willingness of member states, the technical feasibility of integrating systems functioning on incompatible hardware and software, and the administrative capacity of national agencies and services in charge of monitoring maritime traffic, civil protection at sea and border surveillance (not to speak of, again, their willingness to abide by the directives issued by the European and national authorities). These matters are insufficiently addressed in the Commission's impact assessment. Furthermore, this assessment seems to draw heavily from the BORTEC and MEDSEA feasibility studies undertaken by FRONTEX, which are not publicly available in full, thus precluding the possibility of a complete, conclusive evaluation of EUROSUR.

### **3.4 Fundamental freedoms and rights: The current and foreseeable impact of FRONTEX's activities on EU core values**

The evaluation report produced by the Commission services fails to address satisfactorily the impact of FRONTEX's activities in the past on the fundamental freedoms and rights of individuals. This also holds true with regard to the developments foreseen for the agency's role and competences. In particular, the principle of proportionality seems to receive very little attention: the question, in this perspective, is whether the measures proposed by the Commission are suitable and necessary in view of the agency's record of activities. Again, it is important to recall that FRONTEX is a first-pillar, Community body, which implies that it not only has an obligation to uphold the fundamental values of the EU, but also to promote and expand their reach as necessary.

With respect to past activities, the Commission's assessment makes no mention of some of the questions raised by the operations coordinated by FRONTEX, notably in the Canary Islands region (HERA II and III operations). These operations are aimed in part at intercepting crafts suspected of carrying irregular migrants in the territorial waters of Mauritania and Senegal and at returning them back to the coast; thus, they deny the passengers of these crafts the possibility of lodging an asylum application except if the interception took place beyond the territorial waters of those states. Such practices are already problematic from the standpoint of fundamental freedoms and rights, and all the more so since the interception in Mauritanian and Senegalese territorial waters took place on the basis of bilateral agreements between Spain and the relevant authorities of both countries, which have not been made public.<sup>62</sup> In this case, FRONTEX is found in a position where it has not only facilitated what can be construed as a

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<sup>62</sup> See S. Carrera (2007), op. cit.; see also M. Mir, *Managing the EU's External Frontiers: Lessons to be Learned from FRONTEX's Action in the Canary Islands*, Standard Briefing Note for the European Parliament, April 2007.

breach in the principle of protection for asylum-seekers and refugees, but also participated in practices of secrecy, which run against all EU and member state principles of democratic scrutiny and transparency.<sup>63</sup>

The envisaged development of the agency's activities also gives rise to set of issues in the area of fundamental freedoms and rights. First, these issues have not been included in the scope of the Commission's evaluation of the agency. The EUROSUR Communication, furthermore, is remarkably expeditious, since it dedicates only one paragraph to these matters:

The different activities referred to in the previous sections may involve the processing of personal data. Thus, the principles of personal data protection law applicable in the European Union are to be observed, meaning that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. The processing of personal data within the context of EUROSUR must therefore be based on appropriate legislative measures, which define the nature of the processing and lay down appropriate safeguards.<sup>64</sup>

The possibility opened up for FRONTEX to handle personal data in the near future is something that was not foreseen in the original attributions of the agency, and one might wonder whether this step is necessary for the agency to perform its tasks. The sharing of personal data in a system such as the one outlined by the EUROSUR Communication, through which information would be gathered, handled and dispatched in real time to a very large contingent of agencies and services across eight or more member states, will not offer the necessary guarantee in terms of privacy and purposive collection. This is all the more true since the EUROSUR proposal opens up the possibility of relying on 'automated capabilities to recognise patterns, analyse trends, and detect anomalies and thereby predict risks'<sup>65</sup>. The combination of a large-scale information sharing system, handling personal data, and relying on automated processes (otherwise called 'datamining'), opens up the possibility for severe encroachment on the principles which lie at the heart of EU values concerning the operation of databases and information systems.

Furthermore, the EUROSUR proposal is based on the notion that FRONTEX, through new access to information, will be able to provide a 'common pre-frontier intelligence picture'. 'Pre-frontier' seems to imply that cooperation with non-EU countries in intelligence-gathering will be increased. This implication also applies to the possibility for FRONTEX to have a mandate for running pilot projects with relevant non-EU countries.<sup>66</sup> While cooperation with non-EU

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<sup>63</sup> This situation is further aggravated by the attitudes of senior FRONTEX officials about their responsibilities in these matters. In one striking occurrence, the senior staff of the agency failed to attend an important public hearing organised by the European Parliament's LIBE Committee on Civil Liberties, Justice and Home Affairs on "Tragedies of Migrants at Sea" (July 2007), despite the strong insistence of the chairman of the committee that they be present.

<sup>64</sup> See European Commission (2008b), *op. cit.*, p. 11.

<sup>65</sup> European Commission, 2008e, 64.

<sup>66</sup> FRONTEX has working arrangements with Switzerland, Russia and Ukraine. Mandates have been issued for negotiations with (among others) Cape Verde, the former Yugoslavian Republic of Macedonia, Egypt, Libya, Mauritania, Morocco, Senegal and Turkey. The evaluation report itself also notes that "the possibility of developing a cooperation between FRONTEX and Belarus could be explored" (European Commission, 2008a, *op. cit.*, p. 9). Considering the currently strained relationship between most EU governments and institutions and the Belarusian authorities, and the record of the latter as far as respect for fundamental freedoms and rights is concerned, this proposal should have raised a few eyebrows within the Commission services.

countries should undeniably be welcomed, such ventures cannot be undertaken at the expense of EU fundamental values. Cooperation with several of these countries in areas that are as sensitive for fundamental freedoms and rights as border management is a troubling prospect, and even more so if this should lead, in the perspective of EUROSUR's common pre-frontier intelligence picture, to collaboration with intelligence services. There are no guarantees that the principles of democratic scrutiny, transparency, proportionality and privacy will be upheld should such cooperative ventures take place, nor is there a mechanism to ensure the proper scrutiny of such developments.

Underlying these issues, finally, are two questions:

- **Should FRONTEX's activities, being those of a first-pillar body, be more developed in the field of fundamental freedoms and rights?** The answer is clearly positive. Some of the measures proposed by the Commission, such as the development of specialised courses in asylum and human rights law in FRONTEX's training activities, are thus welcome. They should be further developed. More specifically, since FRONTEX has been involved in the coordination of return operations, and since almost all of the joint operations it has coordinated so far have had to do with migration control, the possibility of the agency contributing to the rights of individuals seeking protection in the course of its operations could be explored. It seems that for the time being, the agency is lacking the capacity to provide legal support to persons seeking protection and it has no means of ensuring that the rights of these persons are guaranteed in the operations it coordinates. There is furthermore a necessity to make the agency more accountable and more transparent to democratic scrutiny. **The upholding and promotion of fundamental freedoms and rights should be considered a crucial part of a comprehensive, integrated, border management doctrine, and an integral part of the mandate and activities of FRONTEX.**
- **Does the EU and its member states need additional measures for surveillance of their external borders?** This is the core underlying issue. As highlighted earlier in section 2.3, the record of FRONTEX given the amounts spent on it in 2006–07 is far from impressive. The only result of the agency's activities might well be the displacement of the routes available to migrants to areas even more remote and perilous, further endangering lives and greatly reducing the possibilities available for those individuals seeking protection to do so. The position of the EU institutions and the member states, in this respect, has always been that a balance should be found between security requirements and obligations in the field of fundamental freedoms and rights. The case of FRONTEX underscores how such a 'balance' mechanism operates, **namely by playing out almost systematically in favour of security requirements.** It is important to recall again, from this viewpoint, that security cannot be considered of equal value to freedom and an objective in itself. **Security is a means towards greater freedom and the protection of fundamental rights.**<sup>67</sup>

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<sup>67</sup> On the logic presented here, see ELISE, *ELISE Final Synthesis Report*, Brussels, 2005 (retrieved from the CHALLENGE website at [http://www.libertysecurity.org/IMG/pdf/ELISE\\_FINAL\\_SYNTHESIS\\_REPORT.pdf](http://www.libertysecurity.org/IMG/pdf/ELISE_FINAL_SYNTHESIS_REPORT.pdf) (accessed August 2008)); see also D. Bigo et al., *The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project*, CEPS CHALLENGE Research Paper No. 4, Centre for European Policy Studies, Brussels, 14 February 2007.

#### 4. Conclusions and recommendations

This survey of the Commission's evaluation of FRONTEX and proposals for the latter's future development included in the Commission's border package highlights that several issues have been left unaddressed and a number of questions remain unanswered as far as the activities of the EU's border agency are concerned. Typically, the issue of fundamental freedoms and rights is underplayed in both of the related Communications. Moreover, the documents also fail to provide a balanced qualitative assessment of the agency's activities, and of the added value of the steps envisaged for its development. Altogether, this is illustrative of the 'more is better' logic that currently seems to pervade the developments surrounding questions of security and surveillance in the Union, particularly in relation to the EU's border and migration policies. It is important to reassert, in this respect, that more is not always better, especially when the projected developments do not acknowledge legitimate concerns about accountability and transparency, nor the imperatives of international protection for endangered persons and the upholding of fundamental rights and freedoms.

In light of our survey, several recommendations can be made:

1. The activities of FRONTEX should be submitted to a full evaluation of their impact on fundamental freedoms and rights, including the responsibility to protect. The European Parliament should insist that such a focus be included in the parameters of the independent evaluation of the agency to be commissioned in 2008 by the FRONTEX Management Board, and insist that the results of this report be made public. Should this evaluation be found lacking in this respect, the European Parliament should commission its own assessment.
2. The European Parliament should insist that a unit focusing on legal assistance to persons seeking international protection be set up within FRONTEX. Officials from this unit would be present in all FRONTEX joint operations, to assist asylum-seekers and persons seeking international protection. Efforts to establish a cooperation agreement between FRONTEX and the United Nations High Commissioner for Refugees (UNHCR) should also be accelerated. It could especially open the possibility for UNHCR officials to participate in FRONTEX operations, with potential support from the external borders fund, and give the UNHCR an observer status on the agency's Management Board.<sup>68</sup>
3. The development of EUROSUR should be conditioned on the previous two outcomes. Particularly the need for the envisaged FRONTEX information system to include personal data should be assessed. In this regard, the opinion of the European Data Protection Supervisor should be requested before any new developments can take place. Additionally, further progress concerning the EUROSUR initiative should be halted until the objectives set out in The Hague Programme are fulfilled.
4. The European Parliament should request that FRONTEX documents, including the evaluation reports of the joint operations conducted by the agency, its risk analyses and feasibility studies, are made publicly available. This step would enhance the transparency of EU activities in this area for European citizens and allow for independent external analyses and evaluations of FRONTEX to be developed.

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<sup>68</sup> So far, the UNHCR has established a liaison team at the FRONTEX Warsaw headquarters. See the declarations of M. Soufiane Adjali, UNHCR Senior Liaison Officer to FRONTEX, in the House of Lords 2008 report on the agency (op. cit., pp. 70–73).

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## About CHALLENGE

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The familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. **CHALLENGE** (Changing Landscape of European Liberty and Security) is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the **CHALLENGE** project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The **CHALLENGE** network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life; assessing new vulnerabilities (e.g. the ‘others’ targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).
- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

### The CHALLENGE Observatory

The purpose of the **CHALLENGE** Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network’s activities, please visit the **CHALLENGE** website ([www.libertysecurity.org](http://www.libertysecurity.org)).

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